Office of the State Appellate Defender

Illinois Criminal Law Digest

September 2014

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1. Appeals from post-conviction proceedings are generally governed by the rules for criminal appeals. Under Illinois Supreme Court Rule 604(b) a defendant must file a notice of appeal in the circuit court within 30 days after the entry of a final judgment or, if defendant files a timely motion attacking the final judgment, within 30 days of a dispositive ruling on that motion. If defendant files no motion against the judgment within 30 days, the trial court loses jurisdiction. A timely notice of appeal is necessary to vest the Appellate Court with jurisdiction.

2. The trial court held a third-stage evidentiary hearing on defendant's post-conviction petition. Defendant, who had been deported, was not present during the hearing, but his counsel agreed to hold the hearing in his absence. After dismissing the petition on August 20, the court asked counsel if he wanted to appeal. Counsel reserved his decision, and the court scheduled a status hearing for September 19, and when counsel did not appear, continued the case until September 20.

When counsel did not appear again on September 20, the court extended the deadline for filing post-judgment motions to October 4. On that date counsel informed the court that he would not be filing any post-judgment motions or a notice of appeal. After determining that the clerk had notified defendant at his last known address of his right to appeal, the court appointed OSAD to file a notice of appeal for defendant, which it did on October 5.

3. The Appellate Court held that it lacked jurisdiction to consider defendant's appeal since he did not file a timely notice of appeal within 30 days of the final judgment date. The final judgment was entered on August 20, making September 19 the deadline for filing a notice of appeal or a post-judgment motion. The October 5th filing came too late.

The Appellate Court rejected defendant's argument that the notice of appeal was timely because the trial court had extended the deadline for filing post-judgment motions until October 4, the date it ordered OSAD to file a notice of appeal. Defendant relied on **People v. Church**, 334 Ill. App. 3d 607 (3d. Dist., 2002) for the proposition that upon a proper application and showing of good cause, a trial court has the inherent authority to grant an extension of time for filing a post-judgment motion.

Here, however, defendant never made a proper application or established good cause for an extension of time. Additionally, the trial court never explicitly authorized an extension of time for filing a notice of appeal on September 19. Instead, the court merely stated that it didn't know if defense counsel was going to file a notice of appeal and then continued the case until September 20 "for that purpose." The Appellate Court held that such language was not explicit enough to grant an extension.

4. The court also rejected defendant's argument that jurisdiction was proper because the trial court failed to properly notify defendant of his right to appeal. Under Supreme Court Rule 651(b), upon entry of an adverse judgment in a post-conviction case, the clerk of the trial court shall at once mail or deliver to defendant notice that the court has ruled against him and that he has the right to appeal.

The clerk "at once" mailed notice of the court's ruling to defendant at his last known address. Although the trial court knew defendant had been deported to Poland and the last known address was in the United States, defendant had a responsibility to inform the court of a new address in Poland; the trial court had no obligation to locate the new address itself.

Illinois Supreme Court Rule 606(c) allows a defendant to file a late notice of appeal where the failure to file a timely notice was not due to defendant's culpable negligence. Defendant had no reasonable excuse for failing to keep the court informed of his whereabouts, and his lack of communication with the court was culpable negligence.

5. The dissent would hold that under **Church** the trial court properly extended the time until October 5 for defendant to file a notice of appeal. Although there was no formal application for and showing of good cause, the trial court was concerned about defendant's absence and whether he received notice of the court's judgment. Under these circumstances, defendant's notice of appeal was timely.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

§§2-4(a), 2-6(a)

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

> What the State is essentially trying to do . . . is to piggyback an appeal on defendant's appeal. We can find no authority

for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

§2-6(a)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

1. A claim that has not been raised in a *pro se* post-conviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition. **People v. Jones**, 213 Ill. 2d 498 (2004). In determining whether an issue has been forfeited for not being raised below, courts should afford the petition a liberal construction allowing borderline cases to proceed. A *pro se* petitioner is unlikely to be aware of the precise legal basis for his claim, and hence need only allege enough facts to make an arguable claim. The pleading must, however, bear some relationship to the issue raised on appeal.

2. At trial, the court precluded evidence that another man, N.H., confessed to the police and to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. On direct appeal, defendant's counsel argued that the court erred in precluding evidence of N.H.'s confession to the police, but raised no issue about N.H.'s confession to the jail pastor. The court rejected defendant's argument and affirmed his conviction.

3. In his *pro se* petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue about trial counsel's failure to investigate and present facts showing that N.H. confessed to the murder. In support of this claim, defendant referenced various facts about N.H.'s confessions, including his confession to the pastor. Defendant also claimed that trial counsel failed to take any steps to corroborate N.H.'s confession to the police.

4. On appeal from the first-stage dismissal of his petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue that the trial court erred in precluding N.H.'s confession to the jail pastor based on clergy-penitent privilege. The State argued that defendant forfeited this claim by failing to include it in his *pro se* petition. According to the State, although defendant argued appellate counsel's ineffectiveness both below and on appeal, defendant's post-conviction petition focused on trial counsel's failure to investigate and present facts supporting the admission of N.H.'s confession to the police, while his claim on appeal focused on the trial court's error in precluding evidence of N.H.'s confession to the pastor.

The Appellate Court rejected the State's forfeiture argument. The court pointed to language in **People v. Hodges**, 234 Ill. 2d 1 (2009) and **People v. Edwards**, 197 Ill. 2d 239 (2001), stating that a *pro se* petition should be liberally construed and need not present a completely pled or fully stated claim since a *pro se* litigant may be unaware of the legal basis for his claim. Here, defendant's petition and his appellate argument both alleged ineffectiveness based on omissions related to the same underlying issue of the admissibility of N.H.'s confession. Under the liberal standards appropriate to *pro se* petitions, the two claims are sufficiently related, and hence defendant did not forfeit his appellate argument.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

BATTERY, ASSAULT & STALKING OFFENSES

§7-1(a)(2)

People v. Steele, 2014 IL App (1st) 121452 (No. 1-12-1452, 9/30/14)

To prove a defendant guilty of aggravated battery based on great bodily harm under 720 ILCS 5/12-4(a), the State must prove the existence of a greater and more serious injury than the bodily harm required for simple battery. Bodily harm for simple battery requires some sort of physical pain or damage to the body, such as lacerations, bruises or abrasions. And while there is no precise legal definition of great bodily harm, it must be more serious or grave than the lacerations, bruises, or abrasions that constitute bodily harm.

The State failed to prove great bodily harm beyond a reasonable doubt. The evidence showed that defendant, while trying to evade a traffic stop, struck a police officer with his car. The medical reports from the hospital showed that the officer was treated for abrasions on his knees and discharged after a few hours. A photograph also showed that the officer had abrasions on his right elbow. These injuries did not constitute great bodily harm.

The officer testified about injuries more severe than abrasions, stating that he had torn ligaments in both knees and his right shoulder, and bone fragments in his right shoulder. These injuries would likely constitute great bodily harm, but since his testimony was not supported by the record, it could not form the basis for finding great bodily harm. The medical reports did not reflect any of these injuries, and the officer testified on cross that he was not diagnosed with these more serious injuries.

If the officer received a medical diagnosis showing more serious injuries than were initially identified, then the State needed to offer scans, X-rays, medical reports, or medical testimony to show that diagnosis. Where the question of causation is beyond

the general understanding of the public, the State must present expert evidence to support its theory of causation.

Because the officer was treated and released from the hospital with only abrasions and bruising, the cause of the more serious injuries he testified about would not be readily apparent based on common knowledge and experience. Expert testimony was thus required to show that the more serious injuries were caused by the blow from defendant's car.

Additionally, while the officer was competent to testify about his physical condition since the incident, he was not competent to testify about a medical diagnosis of torn ligaments and bone fragments. Because the officer's testimony was the only evidence of the more severe injuries, and no medical evidence supported his testimony, the State failed to prove that the officer suffered great bodily harm.

The conviction was reduced to simple battery and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Kadie Weck, Chicago.)

COLLATERAL REMEDIES

§9-1(e)(1)

People v. Perez, 2014 IL 115927 (No. 115927, 9/18/14)

Under section 122-2.1(a) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)), the circuit court shall "enter an order" on a petition within 90 days after it was filed and docketed. If the court finds that the petition is frivolous or patently without merit, "it shall dismiss the petition in a written order."

Here the circuit court signed and dated an order dismissing defendant's petition on the 90th day after the petition was filed. The clerk stamped the order filed on the 91st day. The Illinois Supreme Court held that the circuit court failed to properly dismiss the petition within 90 days since the order was not entered until the 91st day.

The word "enter" connotes some type of "formalizing of the decision." Webster's Third New International Dictionary defines "enter" to mean "place in regular form before a law court," usually in writing, and to "put upon record in proper form and order." Black's Law Dictionary defines "entry of judgment" as "the ministerial recording of a court's final decision."

Illinois Supreme Court Rule 272, entitled "When Judgment is Entered," states that where a written judgment order signed by the judge is required, "the judgment

becomes final only when the signed judgment is filed." The committee comments state that the whole purpose of this rule is establish a uniform date for determining the date judgments have been entered. Accordingly, a written judgment is not entered until it is filed.

Here the judgment dismissing defendant's petition was not entered until the clerk filed the court's order on the 91st day. Since the petition was not dismissed within 90 days, the dismissal was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

§§9-1(e)(2), 9-1(o)(3)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

1. A claim that has not been raised in a *pro se* post-conviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition. **People v. Jones**, 213 Ill. 2d 498 (2004). In determining whether an issue has been forfeited for not being raised below, courts should afford the petition a liberal construction allowing borderline cases to proceed. A *pro se* petitioner is unlikely to be aware of the precise legal basis for his claim, and hence need only allege enough facts to make an arguable claim. The pleading must, however, bear some relationship to the issue raised on appeal.

2. At trial, the court precluded evidence that another man, N.H., confessed to the police and to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. On direct appeal, defendant's counsel argued that the court erred in precluding evidence of N.H.'s confession to the police, but raised no issue about N.H.'s confession to the jail pastor. The court rejected defendant's argument and affirmed his conviction.

3. In his *pro se* petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue about trial counsel's failure to investigate and present facts showing that N.H. confessed to the murder. In support of this claim, defendant referenced various facts about N.H.'s confessions, including his confession to the pastor. Defendant also claimed that trial counsel failed to take any steps to corroborate N.H.'s confession to the police.

4. On appeal from the first-stage dismissal of his petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue that the trial court erred in precluding N.H.'s confession to the jail pastor based on clergy-penitent privilege. The State argued that defendant forfeited this claim by failing to include it in his *pro se* petition. According to the State, although defendant argued appellate

counsel's ineffectiveness both below and on appeal, defendant's post-conviction petition focused on trial counsel's failure to investigate and present facts supporting the admission of N.H.'s confession to the police, while his claim on appeal focused on the trial court's error in precluding evidence of N.H.'s confession to the pastor.

The Appellate Court rejected the State's forfeiture argument. The court pointed to language in **People v. Hodges**, 234 Ill. 2d 1 (2009) and **People v. Edwards**, 197 Ill. 2d 239 (2001), stating that a *pro se* petition should be liberally construed and need not present a completely pled or fully stated claim since a *pro se* litigant may be unaware of the legal basis for his claim. Here, defendant's petition and his appellate argument both alleged ineffectiveness based on omissions related to the same underlying issue of the admissibility of N.H.'s confession. Under the liberal standards appropriate to *pro se* petitions, the two claims are sufficiently related, and hence defendant did not forfeit his appellate argument.

5. Defendant's petition stated the gist of a constitutional claim that direct appeal counsel was ineffective for failing to argue that the trial court improperly excluded N.H.'s confession to the jail pastor based on clergy-penitent privilege. Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

Here, the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

6. The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

The case was remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

§9-1(i)(1)

People v. Wilson, 2014 IL App (1st) 113570 (No. 1-11-3570, 9/12/14)

Successive post-conviction petitions are disfavored and may proceed only where the petitioner obtains leave of the court by either asserting actual innocence or satisfying the cause-and-prejudice test. However, where the initial post-conviction petition sought only to reinstate a direct appeal that was lost due to counsel's ineffectiveness, a second petition is not "successive."

The Illinois Constitution provides a convicted person with the right to appeal his or her conviction, and the Post-Conviction Hearing Act affords the statutory right to one complete opportunity to collaterally attack the conviction via post-conviction proceedings. A post-conviction petition which seeks only to reinstate an appeal which was lost through no fault of the defendant is not a true collateral attack and does not represent a complete opportunity to collaterally challenge the conviction.

Where defendant filed a post-conviction petition to regain the right to a direct appeal after defense counsel failed to file a notice of appeal despite defendant's request, a second petition filed after the direct appeal had been resolved should not have been treated as a successive petition. However, the court concluded that by dismissing the subsequent petition as frivolous and patently without merit, the trial court applied the proper first-stage post-conviction test. Therefore, the order dismissing the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

CONFESSIONS

§10-1

People v. Clayton, 2014 IL App (1st) 130743 (No. 1-13-0743, 9/30/14)

1. Under 725 ILCS 5/103-2.1(d), police must make an accurate electronic recording of any "custodial" interrogation that occurs as part of a murder investigation. If a murder suspect is subjected to an unrecorded custodial interrogation, any statements which the suspect makes during or following the non-recorded interrogation are presumed to be inadmissible even if those statements were recorded. The presumption of inadmissibility may be overcome by showing, by a preponderance of the evidence, that the statements were voluntarily given and are reliable. 725 ILCS 5/103-2.1(f).

Under §103-2.1(a), a "custodial interrogation" occurs where: (1) a reasonable person in the subject's position would consider himself or herself to be in custody, and (2) a question is asked that is reasonably likely to elicit an incriminating response.

Factors that are relevant in determining whether an individual is in custody include: (1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present; (3) the presence or absence of the suspect's family and friends; (4) any indicia of a formal arrest such as a show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the suspect arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused.

2. The court concluded that defendant was subjected to custodial interrogation when she made her first statement, and that under §103-2.1 the encounter should have been electronically recorded. Four police officers came to the home of the 17-year-old defendant at 11:00 p.m., and asked that she accompany them to the police station to give a statement. Defendant was not given an opportunity to come to the station on her own or with her parents, with whom she lived, and was transported by officers in an unmarked car. Although the record was conflicting concerning whether the defendant was handcuffed during the ride, upon reaching the station defendant was placed in an interview room and was not told that she could leave.

The State presented no evidence concerning the mood or mode of questioning during the unrecorded interview. In addition, nothing in defendant's background and experience would have "offset her perception that she was obligated to accompany the police . . . and answer any questions posed to her." Under these circumstances, a reasonable person in defendant's position would have believed that she was not free to leave.

The court rejected the State's argument that the videotape of the second interview, in which defendant was asked to affirm that she came to the station voluntarily and of her own free will, indicated that she was not in custody. A teenager could not be expected to argue with police concerning whether she had come to the station voluntarily. Furthermore, even if defendant originally came to the station voluntarily, there was no record of what occurred between the time she arrived and the taped interview, which occurred some five hours later. Thus, the tape did not establish that the statement was voluntary.

3. Furthermore, the record suggested that defendant was subjected to custodial interrogation in the first, unrecorded interview. Although there was no evidence concerning the substance of the first interview, the police gave defendant Miranda warnings before the second interview, elected to record that interview, alluded to defendant's earlier statements, and asked why her statements during the second interview were inconsistent with the first interview. Under these circumstances, the trial court did not err by finding that the defendant was subjected to custodial interrogation during the first interview.

4. Where police fail to record the custodial interrogation of a murder suspect, any subsequent statements are presumed to be inadmissible. The State can overcome the presumption of inadmissibility if it can show by a preponderance of evidence that the statements were given freely and voluntarily. The court concluded that the State failed

to meet its burden where it offered no evidence other than the videotapes themselves to establish that the statements made in the second and third interviews were voluntary and reliable.

5. The court also rejected the State's argument that the failure to record the first interview was "inadvertent," noting that in the trial court the State asserted that the police failed to record the first interview because they believed that defendant was merely a witness. The court also noted that at the trial court level the State failed to argue voluntariness or reliability until its motion for reconsideration, and even then failed to present any relevant evidence.

Because the trial court's finding that the defendant was in custody during the unrecorded first interrogation was not against the manifest weight of the evidence, any statements made after the unrecorded interview were presumed inadmissible. Because the State failed to introduce evidence sufficient to show that the later statements were voluntary and reliable, the trial court properly suppressed those statements.

COUNSEL

§13-5(d)(3)(a)(1)

People v. Boose, 2014 IL App (2d) 130810 (No. 2-13-0810, 9/26/14)

1. When a defendant raises a *pro se* post-trial claim that his trial counsel was ineffective, the trial court must inquire into and examine the basis of the claim. **People v. Krankel**, 102 Ill. 2d 181 (1984). The court may conduct this preliminary examination (known as a **Krankel** hearing) by: (1) questioning trial counsel about the facts and circumstances surrounding defendant's allegations; (2) requesting more specific information from defendant; and (3) relying on its own knowledge of counsel's performance during trial and the insufficiency of defendant's allegations on their face.

If after conducting a preliminary **Krankel** examination, the court concludes that defendant's claim lacks merit, the court may deny the claim. If defendant's claim shows possible neglect of the case, the court should appoint new counsel to argue defendant's claim.

A trial court's method of inquiry during the preliminary **Krankel** examination is somewhat flexible, and it may be permissible in some situations to allow the State to offer concrete and easily verifiable facts. But the State should never be an active participant during the hearing. If the State's participation is anything more than *de minimis*, there is a risk of turning the hearing into an adversarial proceeding with both the State and defense counsel opposing defendant.

2. Here the State was a very active participant during the preliminary **Krankel** hearing. Of defendant's 10 *pro se* allegations of ineffectiveness, the State made comments and arguments about seven of them. On appeal, the State conceded that its participation was error, but argued that the error was harmless because the trial court fully explored defendant's claims and could have easily found that they were meritless based solely on its own investigation.

The Appellate Court rejected the State's argument that this type of error could be harmless. The court found that the State's participation in this case effectively required defendant to argue against both his own defense counsel and the State. The proceeding thus changed from a preliminary **Krankel** examination to an adversarial hearing at which defendant was required to represent himself and argue the merits of his claims. The court would not deem this kind of error harmless.

The case was remanded for a new preliminary **Krankel** hearing before a different judge.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

EVIDENCE

§19-6

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968 (No. 2-13-0968, 9/2/14)

1. Generally, the court has discretion to allow a litigant to reopen its case. The court's ruling on a motion to reopen the evidence will be reversed only if there is a clear showing of abuse of discretion. Factors to be considered in determining whether to reopen a case include whether the failure to introduce the evidence was inadvertent, whether the opposing party is surprised or unfairly prejudiced, the importance of the new evidence, and whether cogent reasons justified denying the motion to reopen. The trial court may permit the proofs to be reopened after it has ruled on a motion to suppress, but also retains discretion to deny a motion to reopen that is filed after a ruling has been issued.

2. The trial court did not abuse its discretion by denying leave to the State to reopen the proofs where, after the trial court had ruled on the motion to suppress, the State sought to reopen the evidence to present an entirely new theory on the validity of a traffic stop. Generally, motions to reopen the evidence concern the theory which was previously argued, not a completely new theory of the case.

Furthermore, the State's attempt to reopen the evidence suggested that the officer in question had been "less than truthful" when he testified that he made the stop because there was a hole in the tail light cover on defendant's vehicle. In its

motion to reopen the proofs, the State claimed that the officer knew at the time of the stop that defendant had just engaged in a drug transaction, but had been instructed by the Department of Homeland Security not to reveal that defendant was the subject of a drug investigation. The court stated:

> Honesty and candor between law enforcement officers and prosecutors is essential to the fair administration of justice. If an ongoing investigation is in jeopardy of being derailed because of an ongoing prosecution, there are legal options available to postpone the disclosure, so long as the defendant's rights are not compromised. In short, lying under oath is never an option.

The order granting defendant's motion to suppress was affirmed.

§19-23(a)

People v. Steele, 2014 IL App (1st) 121452 (No. 1-12-1452, 9/30/14)

To prove a defendant guilty of aggravated battery based on great bodily harm under 720 ILCS 5/12-4(a), the State must prove the existence of a greater and more serious injury than the bodily harm required for simple battery. Bodily harm for simple battery requires some sort of physical pain or damage to the body, such as lacerations, bruises or abrasions. And while there is no precise legal definition of great bodily harm, it must be more serious or grave than the lacerations, bruises, or abrasions that constitute bodily harm.

The State failed to prove great bodily harm beyond a reasonable doubt. The evidence showed that defendant, while trying to evade a traffic stop, struck a police officer with his car. The medical reports from the hospital showed that the officer was treated for abrasions on his knees and discharged after a few hours. A photograph also showed that the officer had abrasions on his right elbow. These injuries did not constitute great bodily harm.

The officer testified about injuries more severe than abrasions, stating that he had torn ligaments in both knees and his right shoulder, and bone fragments in his right shoulder. These injuries would likely constitute great bodily harm, but since his testimony was not supported by the record, it could not form the basis for finding great bodily harm. The medical reports did not reflect any of these injuries, and the officer testified on cross that he was not diagnosed with these more serious injuries.

If the officer received a medical diagnosis showing more serious injuries than were initially identified, then the State needed to offer scans, X-rays, medical reports, or medical testimony to show that diagnosis. Where the question of causation is beyond

the general understanding of the public, the State must present expert evidence to support its theory of causation.

Because the officer was treated and released from the hospital with only abrasions and bruising, the cause of the more serious injuries he testified about would not be readily apparent based on common knowledge and experience. Expert testimony was thus required to show that the more serious injuries were caused by the blow from defendant's car.

Additionally, while the officer was competent to testify about his physical condition since the incident, he was not competent to testify about a medical diagnosis of torn ligaments and bone fragments. Because the officer's testimony was the only evidence of the more severe injuries, and no medical evidence supported his testimony, the State failed to prove that the officer suffered great bodily harm.

The conviction was reduced to simple battery and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Kadie Weck, Chicago.)

§§19-23(b), 19-27(a)

People v. Lerma, 2014 IL App (1st) 121880 (No. 1-12-1880, 9/8/14)

1. A witness may testify as an expert if his experience and qualifications give him knowledge which is not common to lay persons, and his testimony would aid the trier of fact. Expert testimony addressing matters of common knowledge is not admissible unless the subject is difficult to understand and explain. In deciding whether expert testimony is admissible, the trial court should balance the probative value of the evidence against its prejudicial effect, and it must carefully consider and scrutinize the proffered testimony in light of the facts of each case. The trial court has broad discretion in determining the admissibility of expert testimony and its decision is reviewed for an abuse of discretion.

2. Defendant attempted to have an expert testify about eyewitness identifications. The trial court denied the request on the basis that this case involved an identification by a witness who knew defendant. The court believed that under those circumstances an expert's testimony would not be helpful because "it is a fact" that people are less likely to misidentify someone they know, and it would not require an expert to explain this fact to the jury. The court also feared that the expert's testimony would be prejudicial by generating a referendum of the accuracy of eyewitness testimony generally, and possibly providing an opinion on the credibility of the eyewitness in this case.

Defendant obtained another expert who would have directly addressed the trial court's concerns. The second expert would specifically testify that under certain circumstances even identifications by acquaintances can be inaccurate. The expert also stressed that he would not issue judgements about the accuracy of any particular witness's identification or about the ultimate question of defendant's guilt. The trial court again denied defendant's request, referring to its earlier decision.

3. The Appellate Court held that the trial court by relying on its prior ruling failed to carefully consider or scrutinize the second expert's testimony, which directly contradicted the court's prior finding that it is common knowledge that an eyewitness is less likely to misidentify an acquaintance. The trial court thus failed to conduct a meaningful inquiry into the proposed testimony.

The trial court also abused its discretion by relying on its personal belief that "everybody knows" identifications by acquaintances are less likely to be inaccurate. The second expert directly contradicted this belief by concluding that it is not necessarily true that acquaintance identifications are accurate. The trial court also exercised improper judicial protectionism for the State by fearing that the expert would voice his opinion on the credibility of witnesses when the second expert specifically stated he would not do this.

Since the eyewitness identification was central to the State's case, the improper exclusion of expert testimony could have contributed to defendant's conviction and thus was reversible error. The conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

§19-26(d)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

At defendant's trial, the court precluded evidence that another man, N.H., confessed to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. The Appellate Court held that trial court erred in excluding this evidence. The record showed that the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of

his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

GUILTY PLEAS

§§24-3, 24-8(a)

People v. Gooch, 2014 IL App (5th) 120161 (No. 5-12-0161, 9/3/14)

A defendant who is convicted pursuant to a negotiated guilty plea may not challenge his sentence by filing a motion to reconsider, and must instead file a motion to withdraw the plea. Supreme Court Rule 604(d). The court concluded that a "negotiated" plea is one in which the parties reach an agreement concerning sentencing. In other words, where there is no agreement as to sentence but the parties agree that some charges will be dismissed in exchange for the plea, the plea is not "negotiated" for purposes of Rule 604(d).

The court rejected the argument that sentencing considerations are involved in a plea whenever the State loses the ability to obtain sentences on dismissed charges. The court distinguished **People v. Diaz**, 192 Ill.2d 211, 735 N.E.2d 605 (2000), in which the plea agreement specified that the State agreed not to seek consecutive or extended term sentencing, and held that a "plea bargain that is silent as to sentencing is equivalent to an open plea."

Because defendant agreed to plead guilty to one count of criminal sexual assault in exchange for the dismissal of two counts of predatory criminal sexual assault, and there was no agreement concerning sentencing, the plea was not negotiated. Therefore, defendant could challenge the sentence by filing a motion to reconsider the sentence and was not required to move to withdraw the plea.

§24-8(b)(2)

People v. Mineau, 2014 IL App (2d) 110666-B (No. 2-11-0666, mod. op. 9/29/14)

1. Supreme Court Rule 604(d) requires that when a defendant moves to withdraw a guilty plea or to reconsider a sentence following a guilty plea, "[t]he defendant's attorney shall file with the trial court a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or in the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendment to the motion necessary for adequate presentation of any defects in those proceedings." Strict compliance with the rule is required.

Nothing in the rule's plain language requires each attorney to file a certificate when a defendant is simultaneously represented by multiple attorneys from the same office. At the time an amended post-plea motion and a 604(d) certificate were filed, defendant's public defender said that the case was being reassigned to a new public defender. However, the original attorney appeared with the new attorney at the hearing on the motion and filed the notice of appeal. Although the new public defender questioned defendant at the hearing and argued on his behalf, it could be assumed that the first attorney discussed the case with new counsel. Under these circumstances, the new attorney was not required to file a second 604(d) certificate.

2. Furthermore, no error occurred where the certificate stated that counsel consulted with defendant "by mail and/or in person." There is no requirement that counsel state precisely how he or she consulted with the defendant, and the certificate complied with the literal language of Rule 604(d).

3. Similarly, no error occurred where the certificate adopted the text of the rule by stating that counsel consulted with defendant "to ascertain defendant's contentions of error in the sentence *or* the entry of the plea of guilty." The court refused to read the certificate to mean that counsel limited her consultation to one type of error or the other, noting that counsel's motion sought both to withdraw the plea and in the alternative challenge the sentence.

Furthermore, under **People v. Tousignant**, 2014 IL 115329, "or" is to be read as "and" for purposes of Rule 604(d). "Given that 'or' in the rule means 'and,' counsel's certificate here literally complies."

In a concurring opinion, Justice Jorgensen asserted that in light of **Tousignant**, the better practice would be for counsel to use the word "and" in Rule 604 (d) certificates instead of following the rule verbatim.

(Defendant was represented by Panel Attorney Dev Parikh.)

HOMICIDE

§§26-4(a), 26-4(b)
People v. Viramontes, 2014 IL App (1st) 130075 (No. 1-13-0075, 9/24/14)

1. Second degree murder occurs where at the time of the killing, the defendant is acting under sudden and intense passion resulting from serious provocation by the decedent or by another whom the defendant endeavors to kill when he negligently or accidentally causes the death of the decedent. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. Illinois law recognizes four categories of serious provocation: (1) substantial physical injury or assault; (2) mutual quarrel or combat; (3) illegal arrest; and (4) adultery with the defendant's spouse.

Passion, no matter how extreme, is not recognized as provocation unless it fits into one of the above categories. Furthermore, mere words are not recognized as provocation even where they are abusive, aggravated, or indecent. A defendant is entitled to a second degree jury instruction where there is some evidence, even if slight, to support a claim of serious provocation.

2. The court found that as a matter of law, defendant's discovery of his wife's infidelity by reading text messages and seeing nude photographs on her phone did not constitute serious provocation. Under Illinois law, a spouse's adultery constitutes provocation only where the parties are discovered in the act of adultery or immediately before or after such an act, and the killing immediately follows that discovery. The court analogized defendant's discovery of evidence of adultery on his wife's cell phone as similar to a confession of adultery by a spouse, which has been recognized as insufficient provocation to reduce first degree murder to second degree.

3. The court rejected the argument that a second degree murder instruction was justified based on mutual combat between defendant and the decedent. Mutual combat is "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." Provocation by mutual combat will not be found if the accused retaliates in a manner that is out of proportion to the provocation. A defendant may not instigate a fight and then rely on the victim's response as evidence of mutual combat. Mutual combat will not be found if sufficient time elapsed between the alleged provocation and the homicide to permit the "voice of reason" to be heard.

Because the record showed that defendant was the aggressor and inflicted a brutal beating on the decedent, and that his actions were "completely disproportionate" to the decedent's actions of striking him in the chest, the trial court properly declined to give a second degree murder instruction based on mutual conduct.

Defendant's conviction for first degree murder was affirmed.

INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-4(a)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, 9/15/14)

Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

PROBATION, PERIODIC IMPRISONMENT, CONDITIONAL DISCHARGE & SUPERVISION

§40-4(b)

People v. Goossens, 2014 IL App (3d) 120680 (No. 3-12-0680, 9/30/14)

Under the Unified Code of Corrections, the period of probation for a Class 3 felony shall not exceed 30 months. 730 ILCS 5/5-4.5-40(d). The Code lists several mandatory conditions of probation as well as other conditions that the court may impose at its discretion. Among the discretionary conditions, the court may impose reasonable conditions relating to the nature of offense. 730 ILCS 5/5-6-3(b). The Code also identifies specific conditions that the court may impose, including a requirement that defendant support his dependants. 730 ILCS 5/5-6-3(b)(6).

Defendant was convicted of intimidation, a Class 3 felony, and sentenced to two years of probation. As a condition of his probation, he was ordered to become current with his child support. Defendant argued that the child-support condition was unauthorized because it: (1) made the probation term indeterminate in violation of the maximum probation period of 30 months; and (2) did not reasonably relate to the offense of intimidation. The Appellate Court rejected both arguments.

First, the court held that the child-support condition did not make the probation term any more indeterminate than fines and fees imposed as part of probation, since a defendant might fail or refuse to pay them during the probation term. Noting that defendant cited no case law in support of his argument, the court declined to find that the child-support condition made his term impermissibly indeterminate.

The court also held that the limitation of being related to the nature of the offense only applied to the general, non-specific conditions of section 5-6-3(b). It did not apply to the specific conditions enumerated in the statute, including the specific condition of child support listed in section 5-6-3(b)(6). Thus the child support condition did not need to be reasonably related to the underlying offense. The court noted its disagreement with **People v. Campbell**, 325 Ill. App. 3d (2001), where the Fourth District held that all of the conditions, both specific and non-specific, in section 5-6-3(b) must be related to the nature of the offense.

The order of probation was affirmed.

(Defendant was represented by Assistant Defender Rikin Shah, Ottawa.)

SEARCH & SEIZURE

§44-12(a)

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968 (No. 2-13-0968, 9/2/14)

1. 625 ILCS 5/12-201(b) provides that all motor vehicles other than motorcycles must have at least two lighted tail lamps which are mounted on the left rear and right rear of the vehicle "so as to throw a red light visible for at least 500 feet in the reverse direction." 625 ILCS 5/12-201(c) provides that such tail lights must be illuminated whenever the vehicle's headlights are on. Under §12-201(b), a vehicle's headlights must be illuminated from sunset to sunrise, when rain, snow, fog or other conditions require the use of windshield wipers, and at any other time when due to insufficient light or unfavorable atmospheric conditions persons and vehicles on the highway are not clearly discernible at a distance of 1000 feet.

2. The court concluded that the officer lacked a reasonable basis to suspect that defendant violated 625 ILCS 5/12-201(b) because the red tail light cover on his vehicle contained a hole which allowed white light to show through when the brakes were activated. Section 12-201(b) requires that tail lights be illuminated from sunset to sunrise, when conditions require the use of windshield wipers, and when persons and vehicles are not clearly discernible at a distance of 1000 feet. Because the stop occurred at 3:40 p.m. and the citation indicated that the conditions were clear and dry, §12-201(b) did not require the use of two red tail lights.

Under these circumstances, the officer lacked a reasonable basis to believe that a traffic offense was occurring. The order granting defendant's motion to suppress was affirmed.

3. The court concluded that because §12-201(b) was not applicable, it need not determine whether **People v. Girot**, 2013 IL App (3rd) 110936 was correctly decided. **Girot** found that §12-201(b) was violated where defendant drove his vehicle after dark with a hole in the red tail light cover which allowed both red and white light to be visible.

SENTENCING

§45-7(b)

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had

not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

> What the State is essentially trying to do . . . is to piggyback an appeal on defendant's appeal. We can find no authority for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

§§45-7(b), 45-7(c), 45-16(b)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

§§45-10(a), 45-10(e)

People v. Whalum, 2014 IL App (1st) 110959-B (No. 1-11-0959, 9/15/14)

Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

Both **Easley** and the present case involved the offense of unlawful use of a weapon by a felon (UUWF). 720 ILCS 5/24-1.1(a). To prove UUWF the State must show that defendant possessed a weapon or ammunition and had a prior felony conviction. The sentence for UUWF is dictated by subsection (e) and depends on the nature of the prior felony. If the prior felony is UUWF or a number of other felonies listed in subsection (e) (including forcible felonies and a Class 2 or greater felony drug offense), then UUWF is a Class 2 felony; otherwise it is a Class 3 felony.

In **Easley** the charging instrument specifically listed UUWF as the prior felony that would be used to prove the prior conviction element of the offense. Here, by contrast, the prior felony was a drug conviction from Wisconsin. The Appellate Court held that this prior offense did not fall under any of the felonies listed in subsection (e) and therefore the prior conviction did not make defendant's UUWF offense a Class 2 felony.

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley** did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

SPEEDY TRIAL

§§47-1(b), 47-6

People v. Galloway, 2014 IL App (1st) 123004 (No. 1-12-3004, 9/30/14)

Under the speedy trial statute, a defendant on bail or recognizance shall be tried within 160 days of the date he or she demands trial. But the defendant's failure to appear "for any court date set by the court" waives the defendant's speedy trial demand. 725 ILCS 5/103-5(b). When a defendant fails to appear, the previous demand for trial is waived and a new speedy trial period begins when defendant files a new demand.

Here the trial court set a court date for 9 a.m. on September 20, 2011. When the case was first called on that date, defendant did not appear. The court passed the case but defendant was still not present when it was called again at 10:50 am. The court passed the court a second time, but defendant was still not present when it was called a third time. At that point, the court issued a bond forfeiture warrant. When the case was called a fourth time in the afternoon, defendant was present.

Defendant argued on appeal that she did not waive her initial speedy trial demand by failing to appear on the set court date because, while she failed to appear on the first three calls in the morning of that date, she did appear in the afternoon. Defendant characterized her failure to appear in the morning as "mere lateness" rather than a failure to appear as contemplated by the speedy trial statute. Defendant argued that the term "court date set by the court" should be interpreted broadly to include any appearance during business hours of the scheduled date.

The Appellate Court disagreed with defendant's broad interpretation of what constitutes the set court date. Such an interpretation would defeat the purpose of setting a precise date and time, which the trial court did here, and would permit a defendant to evade trial and avoid waiving a speedy trial demand. The terms of the statute "any court date set by the court" encompass both the date and the time set by the court. Since defendant did not appear at the time set by the court, her previous speedy trial demand was waived and there was no speedy trial violation.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

STATUTES

§48-3(a)

People v. Rush, 2014 IL App (1st) 123462 (No. 1-12-3462, 9/30/14)

1. The unlawful use of a weapon by a felon (UUWF) statute makes it unlawful for a convicted felon to possess a firearm. 720 ILCS 5/24-1.1(a). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UUWF statute. 430 ILCS 65/10(c)(1).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old. Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

2. In deciding whether a statute violates the Second Amendment, courts should first determine whether the challenged law affects conduct within the scope of the Second Amendment. If the challenged law only applies to conduct outside the scope of the Second Amendment, then the regulated conduct is categorically unprotected. On the other hand, if a court finds that the law does apply to conduct within the scope of the Second Amendment, the court must then determine what level of constitutional scrutiny to apply.

The Appellate Court first held that banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar**, 2013 IL 112116, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, not strict or intermediate scrutiny. And under a rational basis test, the UUWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

3. The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

TRAFFIC

§50-1

People v. Gonzalez-Carrera, 2014 IL App (2d) 130968 (No. 2-13-0968, 9/2/14)

1. 625 ILCS 5/12-201(b) provides that all motor vehicles other than motorcycles must have at least two lighted tail lamps which are mounted on the left rear and right rear of the vehicle "so as to throw a red light visible for at least 500 feet in the reverse direction." 625 ILCS 5/12-201(c) provides that such tail lights must be illuminated whenever the vehicle's headlights are on. Under §12-201(b), a vehicle's headlights must be illuminated from sunset to sunrise, when rain, snow, fog or other conditions require the use of windshield wipers, and at any other time when due to insufficient light or unfavorable atmospheric conditions persons and vehicles on the highway are not clearly discernible at a distance of 1000 feet.

2. The court concluded that the officer lacked a reasonable basis to suspect that defendant violated 625 ILCS 5/12-201(b) because the red tail light cover on his vehicle

contained a hole which allowed white light to show through when the brakes were activated. Section 12-201(b) requires that tail lights be illuminated from sunset to sunrise, when conditions require the use of windshield wipers, and when persons and vehicles are not clearly discernible at a distance of 1000 feet. Because the stop occurred at 3:40 p.m. and the citation indicated that the conditions were clear and dry, §12-201(b) did not require the use of two red tail lights.

Under these circumstances, the officer lacked a reasonable basis to believe that a traffic offense was occurring. The order granting defendant's motion to suppress was affirmed.

3. The court concluded that because §12-201(b) was not applicable, it need not determine whether **People v. Girot**, 2013 IL App (3rd) 110936 was correctly decided. **Girot** found that §12-201(b) was violated where defendant drove his vehicle after dark with a hole in the red tail light cover which allowed both red and white light to be visible.

UNLAWFUL USE OF WEAPONS

§53-2

People v. Claxton, 2014 IL App (1st) 132681 (No. 1-13-2681, 9/30/14)

A statute declared unconstitutional on its face is void *ab initio*, meaning it was constitutionally infirm from the moment of its enactment and is unenforceable. In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the Class 4 form of aggravated unlawful use of a weapon (AUUW) was facially unconstitutional.

Defendant was convicted of unlawful use of a weapon by a felon (UUWF) based on a prior felony conviction for the Class 4 form of AUUW that had been found facially unconstitutional in **Aguilar**. The Appellate Court reversed defendant's conviction, holding that the State could not rely on a now-void conviction as a predicate offense for UUWF, and thus the State failed to prove an essential element of the offense.

The court rejected the State's argument that it lacked jurisdiction to review defendant's AUUW conviction. Defendant timely appealed his UUWF conviction and attacked that conviction based on the predicate felony being void *ab initio*. Since the prior AUUW conviction cannot serve as the elemental predicate felony for UUWF, the court had jurisdiction to reverse the UUWF conviction properly before it.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

§53-2

People v. Rush, 2014 IL App (1st) 123462 (No. 1-12-3462, 9/30/14)

1. The unlawful use of a weapon by a felon (UUWF) statute makes it unlawful for a convicted felon to possess a firearm. 720 ILCS 5/24-1.1(a). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UUWF statute. 430 ILCS 65/10(c)(1).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old. Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

2. In deciding whether a statute violates the Second Amendment, courts should first determine whether the challenged law affects conduct within the scope of the Second Amendment. If the challenged law only applies to conduct outside the scope of the Second Amendment, then the regulated conduct is categorically unprotected. On the other hand, if a court finds that the law does apply to conduct within the scope of the Second Amendment, the court must then determine what level of constitutional scrutiny to apply.

The Appellate Court first held that banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar**, 2013 IL 112116, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, not strict or intermediate scrutiny. And under a rational basis test, the UUWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

3. The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

WITNESSES

§57-6(b)(4)(f)(1)
People v. Knox, 2014 IL App (1st) 120349 (No. 1-12-0349, 9/30/14)

1. Under People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 (1971), a prior conviction is admissible as impeachment if: (1) the conviction was for a crime that was punishable by death or a term of imprisonment in excess of one year or which involved dishonesty or false statements, (2) less than 10 years has elapsed since the date of the prior conviction or the release of the convicted person from confinement (whichever is later), and (3) the probative value of the prior conviction outweighs the danger of unfair prejudice. The 10-year requirement is based on the belief that a decade of conviction-free living demonstrates sufficient rehabilitation of the witness's credibility to attenuate the probative value of the prior conviction as impeachment. The 10-year period is a requirement for admission of the prior conviction, and is not left to the trial court's discretion.

2. However, where there is evidence that a defendant is intentionally drawing out legal proceedings, the 10-year time limit may be tolled on the ground that an effort to manipulate the judicial system negates the positive inference that is generally drawn from the fact that the defendant has not violated the law for a decade.

3. Similarly, fundamental fairness requires that a prior conviction be admitted as impeachment at a second trial where the original trial occurred within the 10-year period, but the conviction was reversed and the cause remanded for a new trial which occurs outside the 10-year period. In such cases, the prior conviction should be admitted on the same terms as it would have been admitted at the original trial.

4. Here, the trial court properly admitted defendant's prior felony convictions which occurred more than 10 years before the date of the trial. Defendant was convicted of first degree murder in a jury trial in 2006. That trial occurred within the 10-year period for admission of defendant's prior convictions, and convictions were admitted as impeachment.

However, the Appellate Court ordered a new trial because the trial judge declined to make a pretrial ruling on defendant's motion *in limine* to exclude use of the prior convictions as impeachment. The second trial occurred in 2010, more than 10 years after the prior convictions occurred.

Citing fundamental fairness, the Appellate Court held that prior convictions were properly admitted at defendant's second trial because the original trial satisfied the 10-year-rule. Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)